

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JANINE CLAIR JONES,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration.

Defendant.

CASE NO. 14-cv-05417 BHS-JRC

REPORT AND RECOMMENDATION
ON PLAINTIFF'S COMPLAINT

Noting Date: January 2, 2015

This matter has been referred to United States Magistrate Judge J. Richard
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
271-72 (1976). This matter has been fully briefed (see Dkt. Nos. 18, 19, 20).

After considering and reviewing the record, the Court concludes that the ALJ failed to evaluate the medical evidence properly by failing to indicate why an opinion from an examining doctor was not included into plaintiff's residual functional capacity.

1 (“RFC”). The ALJ also failed to provide legitimate reasons supported by substantial
2 evidence in the record for failing to credit opinions from another examining doctor
3 regarding plaintiff’s social limitations. Because these errors are not harmless, this matter
4 should be reversed and remanded for further administrative proceedings pursuant to
5 sentence four of 42 U.S.C. § 405(g).

6 BACKGROUND

7 Plaintiff, JANINE CLAIR JONES, was born in 1981 and was 28 years old on the
8 amended alleged date of disability onset of March 1, 2010 (*see* AR. 37, 59, 201-02, 203-
9 09). Plaintiff completed high school and attended college but does not have a degree (AR.
10 61). Plaintiff has work experience as a barista and nuts and seeds roaster, a healthcare
11 patient account representative, a stocker, a cashier, a receptionist and as a childcare
12 assistant in a daycare (AR. 237-48). Plaintiff’s last job as a barista ended when she was
13 not able to get to work on time (AR. 69).

15 According to the ALJ, plaintiff has at least the severe impairments of “major
16 depressive disorder and anxiety disorder (20 CFR 404.1520(c) and 416.920(c))” (AR.
17 39).

18 In February, 2011, plaintiff was single and living in an apartment in Olympia with
19 seven other people (AR. 339, 420).

20 PROCEDURAL HISTORY

22 Plaintiff’s application for disability insurance benefits (“DIB”) pursuant to 42
23 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
24 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and

1 following reconsideration (see AR. 77-83, 84-90, 93-100, 101-08). Plaintiff's requested
 2 hearing was held before Administrative Law Judge Gary Elliott ("the ALJ") on January
 3 30, 2013 (see AR. 56-74). On February 7, 2013, the ALJ issued a written decision in
 4 which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security
 5 Act (see AR. 34-51).

6 On March 21, 2014, the Appeals Council denied plaintiff's request for review,
 7 making the written decision by the ALJ the final agency decision subject to judicial
 8 review (AR. 1-6). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court
 9 seeking judicial review of the ALJ's written decision in May, 2014 (see Dkt. Nos. 1, 3).
 10 Defendant filed the sealed administrative record regarding this matter ("AR.") on August
 11 18, 2014 (see Dkt. Nos. 13, 14).

12 Defendant summarizes the issues raised by plaintiff in her opening brief as
 13 follows: (1) Whether or not the ALJ gave legally adequate reasons for finding plaintiff
 14 not entirely credible; (2) Whether or not the ALJ properly considered the opinions of
 15 Richard Coder, Ph.D., Brett Trowbridge, Ph.D. and Terilee Wingate, Ph.D.; (3) Whether
 16 or not the ALJ harmfully erred in failing to adequately discuss plaintiff's obesity; and (4)
 17 Whether or not the ALJ presented a valid RFC assessment to the vocational expert (see
 18 Dkt. No. 19, pp. 1-2).

19 STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 21 denial of social security benefits if the ALJ's findings are based on legal error or not
 22 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 23

1 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 2 1999)).

3 DISCUSSION

4 (1) **Whether or not the ALJ properly considered the opinions of Richard**
 5 **Coder, Ph.D., Brett Trowbridge, Ph.D. and Terilee Wingate, Ph.D.**

6 Here, as summarized by defendant, when “considering the medical opinion
 7 evidence, the ALJ gave significant weight to the opinion of Dr. Coder, some weight to
 8 the opinion of Dr. Trowbridge, and some weight to the opinion of Dr. Wingate[;
 9 h]owever, the ALJ rejected the more significant limitations assessed by Dr.
 10 Trowbridge” (Dkt. 19, p. 8). Although defendant contends that the ALJ provided specific
 11 and legitimate reasons for resolving the evidence this way, the Court notes that despite
 12 giving significant weight to the opinion of Dr. Coder, the ALJ failed to explain why one
 13 of the opinions from Dr. Coder was not accommodated into plaintiff’s RFC.

14 Because the Court concludes that this error is not harmless, as discussed below,
 15 the Court concludes that this matter should be reversed and remanded for further
 16 administrative proceedings.

17 A contradicted opinion from an examining or treating doctor can be rejected “for
 18 specific and legitimate reasons that are supported by substantial evidence in the record.”
 19 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (*citing Andrews v. Shalala*, 53 F.3d
 20 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

22 Dr. Richard Coder, Ph.D., examined and evaluated plaintiff on February 19, 2011
 23 (see AR. 338–43). Dr. Coder reviewed numerous records and noted that plaintiff at the
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1 time was taking Citalopram for depression (*see* AR. 338 – 39). Dr. Coder noted that
2 plaintiff “was obese for her height” (AR. 339). Dr. Coder observed that plaintiff’s eye
3 contact was minimal and opined that her affect was flat (*see id.*). During his mental status
4 examination (“MSE”), Dr. Coder observed that although plaintiff’s stream of mental
5 activity was within normal limits, “she was sometimes slow to respond to questions”
6 (AR. 340). Similarly, although Dr. Coder indicated that plaintiff’s velocity’s speech was
7 normal, the volume of her speech was low (*see id.*). Dr. Coder noted that plaintiff
8 reported that her mood was tired and anxious, and he opined that her “affect was
9 consistent with stated mood [and] she appeared to have low energy” (*see id.*). Dr. Coder
10 noted that plaintiff “occasionally became teary-eyed during the interview” (*see id.*).
11

12 Regarding plaintiff’s intellectual functioning, Dr. Coder observed during testing
13 that plaintiff’s “intellectual functioning appeared to be within the average range,” and
14 that her recent and remote memory were intact (*see id.*). Dr. Coder reported plaintiff’s
15 ability to conduct serial seven calculations accurately and to perform a simple three step
16 command successfully (AR. 341). Regarding her concentration, persistence and pace,
17 Dr. Coder noted various activities that plaintiff reported being able to conduct for an hour
18 such as knitting, walking, laundry, and working on the computer (*see id.*). He noted that
19 she reported that she could read for more than an hour (*see id.*).
20

21 Dr. Coder indicated that there did not “appear to be any inconsistencies throughout
22 the evaluation” (AR. 342). In his medical source statement, Dr. Coder indicated that
23 plaintiff’s ability to reason, her understanding and her judgment were good (*see id.*). Dr.
24 Coder also indicated that plaintiff’s ability to follow complex instruction also was good,
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1 as was her memory functions and sustain concentration and persistence (*see id.*). He also
2 indicated that plaintiff's social interaction and interpersonal relationships were good (AR.
3 343). However, despite noting plaintiff's various good levels of functioning, Dr. Coder
4 opined that plaintiff's "ability to adapt to routine changes is likely to be impacted by
5 reported depressed mood, anxiety, feelings of being overwhelmed, and low energy" (*see
6 id.*).

7 In his written decision, the ALJ discussed the opinion of Dr. Coder, although he
8 referred to him as Dr. Cooper (*see AR. 343–44*). Despite noting that Dr. Coder opined
9 that plaintiff's "ability to adapt to routine changes is likely to be impacted by reported
10 depressed mood, anxiety, feelings of being overwhelmed, and low energy," the ALJ
11 provided no reason for failing to include this opinion into plaintiff's RFC (*see AR. 43-44,*
12 343). In fact, the ALJ indicated his finding that the opinion from Dr. Coder "is consistent
13 with the claimant's longitudinal record as well as the claimant's reported activities" (*see
14 AR. 43*). Despite providing rationale for failing to credit fully the global assessment of
15 functioning ("GAF") score of 45 assigned by Dr. Coder, the ALJ failed to specify why
16 the opinion regarding adaptability to routine changes was not included in the RFC (*see
17 AR. 43-44*). Although the ALJ noted various intact abilities by plaintiff, Dr. Coder also
18 noted these intact abilities, yet nevertheless provided the specific opinion regarding
19 plaintiff's limitation in her ability to adapt to routine changes in the work environment
20 (*see AR. 342–43*). In addition, in contrast to the ALJ's finding that plaintiff's subjective
21 complaints of symptoms were not fully credible, Dr. Coder specifically opined that
22 plaintiff "appeared to respond to questions in an open and honest manner, [and that there]
23

1 did not appear to be any evidence of [plaintiff] exaggerating symptoms, nor did there
2 appear to be any inconsistencies throughout the evaluation" (AR. 342). Furthermore, Dr.
3 Coder supported his assessment of plaintiff's depressed mood, anxiety and low energy by
4 his specific observations during his examination, noting that plaintiff's eye contact was
5 minimal and her affect was flat (AR. 339); that "she was sometimes slow to respond to
6 questions" and that the volume of her speech was low; that her affect was consistent with
7 her stated mood of being tired and anxious and that she appeared to have low energy,"
8 and that plaintiff "occasionally became teary-eyed during the interview" (AR. 340).

9
10 When an ALJ seeks to discredit a medical opinion, he must explain why his own
11 interpretations, rather than those of the doctors, are correct. *Reddick v. Chater*, 157 F.3d
12 715, 725 (9th Cir. 1998) (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988));
13 see also *Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989) ("When mental
14 illness is the basis of a disability claim, clinical and laboratory data may consist of the
15 diagnosis and observations of professionals trained in the field of psychopathology. The
16 report of a psychiatrist should not be rejected simply because of the relative imprecision
17 of the psychiatric methodology or the absence of substantial documentation") (quoting
18 *Poulin v. Bowen*, 817 F.2d 865, 873-74 (D.C. Cir. 1987) (quoting *Lebus v. Harris*, 526
19 F.Supp. 56, 60 (N.D. Cal. 1981))); *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990)
20 ("judges, including administrative law judges of the Social Security Administration, must
21 be careful not to succumb to the temptation to play doctor. The medical expertise of the
22 Social Security Administration is reflected in regulations; it is not the birthright of the
23

1 lawyers who apply them. Common sense can mislead; lay intuitions about medical
 2 phenomena are often wrong") (internal citations omitted)).

3 In addition, the Court notes that "experienced clinicians attend to detail and
 4 subtlety in behavior, such as the affect accompanying thought or ideas, the significance
 5 of gesture or mannerism, and the unspoken message of conversation. The Mental Status
 6 Examination allows the organization, completion and communication of these
 7 observations." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status*
 8 *Examination 3* (Oxford University Press 1993). "Like the physical examination, the
 9 Mental Status Examination is termed the *objective* portion of the patient evaluation." *Id.*
 10 at 4 (emphasis in original).

12 The MSE generally is conducted by medical professionals skilled and experienced
 13 in psychology and mental health. Although "anyone can have a conversation with a
 14 patient, [] appropriate knowledge, vocabulary and skills can elevate the clinician's
 15 'conversation' to a 'mental status examination.'" Trzepacz and Baker, *supra*, *The*
 16 *Psychiatric Mental Status Examination 3*. A mental health professional is trained to
 17 observe patients for signs of their mental health not rendered obvious by the patient's
 18 subjective reports, in part because the patient's self-reported history is "biased by their
 19 understanding, experiences, intellect and personality" (*id.* at 4), and, in part, because it is
 20 not uncommon for a person suffering from a mental illness to be unaware that her
 21 "condition reflects a potentially serious mental illness." *Van Nguyen v. Chater*, 100 F.3d
 22 1462, 1465 (9th Cir. 1996) (citation omitted).

1 For the reasons stated, and based on the record as a whole, the Court concludes
 2 that the ALJ failed to explain why his opinions are more correct than those of the
 3 examining doctor who specializes in psychology. *See Reddick, supra*, 157 F.3d at 725
 4 (*citing Embrey, supra*, 849 F.2d at 421-22); *see also Blankenship, supra*, 874 F.2d at
 5 1121. The ALJ did not provide “specific and legitimate reasons that are supported by
 6 substantial evidence in the record” for his failure to credit fully this opinion from Dr.
 7 Coder. *See Lester, supra*, 81 F.3d at 830-31 (*citing Andrews, supra*, 53 F.3d at 1043;
 8 *Murray, supra*, 722 F.2d at 502).

9
 10 In addition, according to Social Security Ruling (“SSR”) 96-8p, a RFC assessment
 11 by the ALJ “must always consider and address medical source opinions. If the RFC
 12 assessment conflicts with an opinion from a medical source, the adjudicator must explain
 13 why the opinion was not adopted.” *See* SSR 96-8p, 1996 SSR LEXIS 5 at *20. Although
 14 “Social Security Rulings do not have the force of law, [n]evertheless, they constitute
 15 Social Security Administration interpretations of the statute it administers and of its own
 16 regulations.” *See Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989) (*citing*
 17 *Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th Cir. 1988); *Paulson v. Bowen*, 836 F.2d
 18 1249, 1252 n.2 (9th cir. 1988)) (internal citation and footnote omitted). As stated by the
 19 Ninth Circuit, “we defer to Social Security Rulings unless they are plainly erroneous or
 20 inconsistent with the [Social Security] Act or regulations.” *Id.* (*citing Chevron USA, Inc.*
 21 *v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Paxton, supra*, 865 F.2d at 1356) (footnote
 22 omitted).
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1 Therefore, the Court also concludes that for this reason, too, the ALJ erred by
 2 failing to specify why Dr. Coder's opinion regarding plaintiff's limitations with respect to
 3 adapting to routine changes is not included within plaintiff's RFC.

4 Finally, the Ninth Circuit has concluded that it was not harmless error for the ALJ
 5 to fail to discuss a medical opinion. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012)
 6 (*citing* 20 C.F.R. § 404.1527(c)). According to the Ninth Circuit, when the ALJ ignores
 7 significant and probative evidence in the record favorable to a claimant's position, such
 8 as an opinion from an examining or treating doctor, the ALJ "thereby provide[s] an
 9 incomplete residual functional capacity [RFC] determination." *See id.* at 1161.
 10 Furthermore, when the RFC is incomplete, the hypothetical question presented to the
 11 vocational expert relied on at step five necessarily also is incomplete, "and therefore the
 12 ALJ's reliance on the vocational expert's answers [is] improper." *See id.* at 1162.

14 For this reason, based on the record, and because the ALJ's failure to include this
 15 limitation into plaintiff's RFC affected the ultimate disability determination, the Court
 16 concludes that the error is not harmless error. *See id.*; *see also Molina v. Astrue*, 674 F.3d
 17 1104, 1115 (9th Cir. 2012) (*citing* *Stout v. Commissioner, Social Security Administration*,
 18 454 F.3d 1050, 1054 (9th Cir. 2006) (*quoting* *Carmickle v. Comm'r Soc. Sec. Admin.*,
 19 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted); *Shinsheki v. Sanders*, 556
 20 U.S. 396, 407 (2009) (*quoting* 28 U.S.C. § 2111) (codification of the harmless error rule).
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22 Regarding the opinion of examining doctor, Dr. Brett Trowbridge, Ph.D., the ALJ
 23 apparently fails to credit fully the opinions of Dr. Trowbridge regarding plaintiff's
 24 marked limitations in social factors (*see* AR. 305) based in part on a finding that they are

1 “extreme in light of her mini mental status examination” (AR. 44). However, although
 2 plaintiff scored 30/30 on her mini-MSE, the mini-MSE utilized by Dr. Trowbridge tested
 3 plaintiff’s cognitive abilities, such as her orientation, attention, calculation,
 4 comprehension, reading and writing (*see* AR. 312–13). Indeed, Dr. Trowbridge indicated
 5 that plaintiff had mostly mild limitations with respect to her cognitive factors (*see* AR.
 6 305). In contrast, Dr. Trowbridge opined that plaintiff suffered from marked limitations
 7 with respect to her social factors, for example, opining that plaintiff was markedly limited
 8 with respect to her ability to care for self, noting that this opinion was based on her
 9 obesity (*see* AR. 305). Similarly, Dr. Trowbridge opined that plaintiff suffered from
 10 marked limitations with respect to her ability to maintain appropriate behavior in a work
 11 setting, specifically indicating that this opinion was based on his observation that plaintiff
 12 was depressed and anxious (*see id.*). Furthermore, in contrast to the finding by the ALJ
 13 that “Dr. Trowbridge based his opinion heavily on the claimant’s subjective symptoms
 14 reports” (AR. 44), this latter opinion by Dr. Trowbridge appears to be based, at least in
 15 part, on Dr. Trowbridge’s direct observations, as he indicated in his opinion that he
 16 observed plaintiff’s symptoms of depression and anxiety (*see* AR. 303).

18 For the reasons discussed, the Court does not find persuasive defendant’s
 19 argument that the opinions of Dr. Trowbridge regarding plaintiff’s marked social
 20 limitations are inconsistent with plaintiff’s 30/30 on the mini-MSE, which tested
 21 plaintiff’s cognitive limitations (*see* Dkt. 19, p. 13).

22 The Court’s discussion of the March 11, 2010 opinion of Dr. Trowbridge, also
 23 discussed by the ALJ, equally is applicable to the September 30, 2010 opinion of Dr.
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1 Trowbridge, which the ALJ did not appear to discuss at all (*see* AR. 319–35). This error,
2 too, should be corrected by the ALJ following remand of this matter.

For the reasons stated and based on the record as a whole, the Court concludes that the ALJ failed to provide specific and legitimate reasons for failing to credit fully the opinions of Dr. Trowbridge. *See Lester, supra*, 81 F.3d at 830-31 (citing *Andrews, supra*, 53 F.3d at 1043; *Murray, supra*, 722 F.2d at 502).

Although the Court concludes that the ALJ erred in his evaluation of the medical evidence, it is not clear from the record that the ALJ would be required to find plaintiff disabled if the improperly discredited opinions or the opinions missing from the RFC were credited in full. There is no testimony from the vocational expert on the effect on employability with the limitation opined by Dr. Coder regarding adaptability to changes in routine, and there likewise is no testimony from the vocational expert as to whether or not a hypothetical individual with the social limitations opined by Dr. Trowbridge would be able to perform plaintiff's past relevant work or other work existing in the national economy. It is not clear from the record that plaintiff is in fact disabled. Therefore, this matter should be reversed and remanded for further consideration, not with a direction to award benefits. *See Garrison v. Colvin*, 759 F.3d 995, 1021, 1023 (9th Cir. 2014).

(2) Whether or not the ALJ gave legally adequate reasons for finding plaintiff not entirely credible.

The Court already has concluded that the ALJ erred in reviewing the medical evidence and that this matter should be reversed and remanded for further consideration, *see supra*, section 1. In addition, a determination of a claimant's credibility relies in part

1 on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). Therefore, for
 2 this reason, plaintiff's credibility should be assessed anew following remand of this
 3 matter.

4 **(3) Whether or not the ALJ harmfully erred in failing to adequately discuss**
 5 **plaintiff's obesity.**

6 Multiple examiners mentioned plaintiff's obesity in their treatment record or
 7 opinion (*see, e.g.*, AR. 305, 307 ("markedly obese"), 339). According to Social Security
 8 Ruling, "SSR," 02-01p, the Administration "consider[s] obesity to be a medically
 9 determinable impairment and remind[s] adjudicators to consider its effects when
 10 evaluation disability [ALJs are] to consider the effects of obesity not only under
 11 the listings but also when assessing a claim at other steps of the sequential evaluation
 12 process." 2002 SSR LEXIS 1 at *2-*3 (2002). The ALJ should provide a more thorough
 13 discussion of plaintiff's obesity following remand of this matter.

14

15 **(4) Whether or not the ALJ presented a valid residual functional capacity**
 16 **("RFC") assessment to the vocational expert ("VE").**

17 As discussed already by the Court, *see supra*, section 1, the ALJ's RFC presented
 18 in a hypothetical to the VE was incomplete. Therefore, the RFC must be determined
 19 anew following remand of this matter and following a proper evaluation of the medical
 20 evidence.

21 CONCLUSION

22 Based on the stated reasons, and the relevant record, the undersigned recommends
 23 that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42
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1 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with this
2 Report and Recommendation. **JUDGMENT** should be for **plaintiff** and the case should
3 be closed.

4 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
5 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
6 Civ. P. 6. Failure to file objections will result in a waiver of those objections for
7 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).
8 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
9 matter for consideration on January 2, 2015, as noted in the caption.
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11 Dated this 12th day of December, 2014.

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14 J. Richard Cretura
United States Magistrate Judge
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